Sivalingam a/l Periasamy v Periasamy & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–01–11 OF 1995
GOPAL SRI RAM, MAHADEV SHANKAR JJCA AND AHMAD FAIRUZ J
4 SEPTEMBER 1995

Civil Procedure *— Appeal — Facts — Trial judge's finding of fact — Whether appellate court has duty to intervene where trial court has misdirected itself — Whether fundamental misdirection such that no reasonable court would have arrived at the same conclusion*

Civil Procedure *— Appeal — Evidence — Judge's evaluation of evidence — Interference by appellate court — Material fact not put to other party during cross-examination — Failure of judge to take into account when assessing evidence*

The appellant was a detainee at the Pulau Jerejak Detention Camp and the first respondent ('Samy') was a prison warden holding the rank of corporal. Whilst under the supervision of Samy, the appellant climbed a coconut tree from which he fell and sustained severe injuries. The appellant claimed that Samy had ordered him to climb the coconut tree and pluck the coconuts. The appellants also testified that dire consequences would result from disobedience of any order and this was not challenged by the respondents. On the other hand, Samy alleged that the appellant had requested permission to climb the tree and had climbed it even though he had expressly disallowed it. However, official record showed that the appellant up to that point had never had a single act of disobedience recorded against him. Compelled to choose between these two conflicting versions, the trial judge preferred Samy's version and found that the appellant, in defiance of orders, had voluntarily climbed the tree on his own accord and was therefore not entitled to recover damages. The appellant appealed.

Held, allowing the appeal:

(1) It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, the appellate court has a duty to intervene where a trial court has so fundamentally misdirected itself, that one may say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

(2) The trial judge should have asked himself whether it was inherently probable that the appellant would have dared disobey an express order given to him not to climb the tree. If the trial judge had properly assessed the totality of the evidence, he would have concluded that the defence story was wholly improbable.

(3) Nowhere in the defence was it alleged that there was a request from the appellant to climb the tree as alleged in the evidence.

Further and more importantly, the respondents never put to the appellant under cross-examination that such a request had come from him. If the trial judge had taken this failure into account when he assessed the evidence, he would undoubtedly have found for the appellant.

[Bahasa Malaysia summary

Perayu adalah seorang tahanan di Kem Tahanan Pulau Jerejak dan penentang pertama ('Samy') adalah seorang warden penjara yang memegang jawatan korporal. Ketika berada di bawah penyeliaan Samy, perayu telah memanjat sebatang pokok kelapa dari mana beliau jatuh dan mengalami kecederaan parah. Perayu mengata bahawa Samy telah memerintahkannya supaya memanjat pokok kelapa tersebut dan memetik buah kelapa yang ada. Perayu juga telah memberi keterangan bahawa keingkaran sebarang perintah akan membawa akibat teruk dan ini tidak dicabar oleh penentang. Sebaliknya, Samy mengatakan bahawa perayu telah meminta kebenaran untuk memanjat pokok itu dan telah memanjatnya walaupun beliau telah melarangnya berbuat demikian. Walau bagaimanapun, rekod rasmi menunjukkan bahawa setakat itu perayu tidak pernah mempunyai apa-apa perbuatan ingkar dicatatkan terhadapnya. Dipaksa memilih di antara dua versi yang berlainan, hakim perbicaraan memilih versi Samy dan mendapati bahawa perayu, dengan mengingkari perintah, telah dengan sukarela memanjat pokok itu mengikut kehendak sendiri dan oleh itu tidak berhak menerima ganti rugi. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Adalah undang-undang mantap bahawa suatu mahkamah rayuan tidak mudah bercampur tangan dengan pendapat mahkamah perbicaraan mengenai fakta kerana undang-undang telah mengamanahkan tugas utama untuk menilai keterangan yang diberikan kepada mahkamah perbicaraan. Walau bagaimanapun, mahkamah rayuan mempunyai kewajipan untuk bercampur tangan di mana mahkamah perbicaraan telah memberi suatu salah arah yang asas kepada dirinya, di mana seseorang boleh berkata bahawa tiada mahkamah yang munasabah yang telah memberi arahan yang betul dan bertanyakan soalan yang betul akan mencapai kesimpulan yang serupa.

(2) Hakim perbicaraan sepatutnya menanya dirinya sama ada memang sukar mempercayai bahawa perayu akan berani membantah arahan yang jelas yang diberikan kepadanya supaya tidak memanjat pokok itu. Jika hakim perbicaraan telah menilai keseluruhan keterangan dengan betul, beliau akan memutuskan bahawa cerita pembelaan tidak dapat dipercayai.

(3) Pembelaan penentang tidak mengatakan bahawa terdapat suatu permintaan daripada perayu untuk memanjat pokok itu seperti yang dikatakan dalam keterangan. Selanjutnya dan lebih penting

lagi, pihak penentang tidak mengemukakan kepada perayu semasa pemeriksaan balas bahawa permintaan itu datang daripadanya. Jika hakim perbicaraan mengambil kira kegagalan ini semasa menilai keterangan yang ada beliau sudah tentu akan membuat keputusannya dengan memihak kepada perayu.]

Notes

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (folld)

Browne v Dunn (1893) 6 R 67 (refd)

'Eurymedon', The (1942) 73 Lloyd LR 217 (folld)

Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403 (refd)

Appeal from: Civil Suit No 605–77 (High Court, Pulau Pinang)

Dalgit Singh and *Harbans Singh* (*Gurdev Dalgit Su & Co*) for the appellant.
Syed Marzidy and *Mazni Buang* (Federal Counsel) for the respondent.

Cur Adv Vult

Gopal Sri Ram and Mahadev Shankar JJCA: This is an appeal against the dismissal of a claim for damages for personal injury. The appellant is referred hereafter to as the plaintiff.

On 17 November 1976, the plaintiff was a detainee at the Pulau Jerejak Detention Camp. The first defendant ('Samy') was a prison warden holding the rank of corporal. It is common ground that whilst under the supervision of Samy, the plaintiff climbed a coconut tree from which he fell, sustaining severe injury to his spinal cord with resulting paralysis of both legs and loss of bladder and bowel control.

The plaintiff testified that he had no experience in climbing coconut trees. He said that on the day in question he and his brother and another two detainees, one of whom was named Rajendran, were called out by Samy to do some work in the immediate vicinity of a Hindu 'temple'. On reaching the 'temple', the plaintiff said that Samy ordered him to climb the tree and pluck the coconuts. The plaintiff said that the discipline in the camp was such that disobedience attracted severe punishment. So he climbed the tree as instructed but he lost his hold in the course of plucking the coconuts and fell to the ground. The plaintiff's brother also gave evidence confirming that such an order was given. The plaintiff also called Rajendran who could not confirm whether he personally heard the order by Samy to the plaintiff but otherwise corroborated the rest of the plaintiff's evidence.

For the defence, a number of senior officers were called to testify that it was common knowledge that detainees were not permitted to climb trees

in the detention camp. Samy himself said that on the day in question he only called out two persons, namely, the plaintiff and his brother. On arrival at the 'temple' he said, the plaintiff had asked him permission to climb the tree in order to pluck coconuts for his brother but he refused this request. He then ordered both of them to clean the 'temple' compound. He himself washed the 'temple' idol. He then said that he only noticed the plaintiff when the plaintiff was on top of the tree and the coconuts started to fall whereupon he ordered the plaintiff to come down carefully. Immediately after this the plaintiff fell down.

This so called 'temple' was only a shrine with a short plank wall of about 3–4ft in height around it. Samy's evidence was that he was only about 13ft from the tree and the height of the tree between 12–18ft. It is the duty of a prison warden to maintain close surveillance of the detainees in his custody. It is impossible to expect that from a distance of 13ft Samy would not have been aware of the movements of the plaintiff. Furthermore, if the alleged request had been made and refused, the plaintiff's ascent must have been executed in total defiance of an immediate order. The official record showed that the plaintiff up to that point had never had a single act of disobedience recorded against him.

Compelled to choose between these two conflicting versions, the learned trial judge preferred Samy's version and found that the plaintiff, in defiance of orders, had voluntarily climbed the tree on his own accord and was therefore not entitled to recover.

We are fully conscious that this is an appeal that turns upon a question of fact. However, a careful reading of the trial judge's judgment shows that the process of reasoning adopted by him for preferring the evidence of the defence witnesses is based upon a wrong premise and does not accord with a well-settled principle that goes to form the fulcrum upon which the scales of procedural justice turn.

First, the trial judge appears to have completely overlooked the inherent probabilities of the case. Evidence was led to prove that the plaintiff was a person who had a history of following orders given to him by those who held him in their custody, including the first respondent. Indeed the plaintiff testified, without challenge, of the dire consequences that would ensue from disobedience. All this evidence was entirely accepted by the defendants. Yet, the defendants' case was that on this occasion the plaintiff had wilfully disobeyed an express order given to him. The question which the trial judge ought to have asked himself is whether it was inherently probable that the plaintiff, on this isolated instance, would have dared disobey an express order given to him not to climb the tree. Had he done so, he would, upon a proper assessment of the totality of the evidence, have come to the conclusion that the defence story was wholly improbable.

So, here we have a case where there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him. And of the principles that should govern such a case as the present there is no doubt.

It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the

primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

In a case such as this where the task of the court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words of Viscount Simon (who was in the majority) in *The 'Eurymedon'* (1942) 73 Lloyd LR 217:

> The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. [Which, we hasten to add, is not the case here.] I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us in overthrowing what has already been decided. *If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view* — in these mundane happenings there is no more conclusive argument than *non est credendum quia impossibile. If the impeached decision were shown to be an unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.*
>
> If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed. (Emphasis added.)

In the same case, Lord Atkin, while recording a vigorous dissent, said (at p 220):

> My Lords, this is an appeal from the Court of Appeal, who affirmed a decision of Langton J, holding that in a collision between the Eurymedon, belonging to the appellants, and the British Reliance, belonging to the respondents, the Eurymedon was alone to blame. The learned judge, of course, saw the witnesses, and had that initial advantage which, as I have said elsewhere, an appeal tribunal can never recapture. But judges have before this been mistaken in their acceptance of witnesses' stories; and if the appellate tribunal is satisfied that a mistake has been made, I apprehend that it is their duty to say so. An appellate court in this country proceeds to consider an appeal by way of rehearing: on the rehearing it is equally charged with the task of doing justice between the parties. The judge may have accepted the evidence of one party on a general survey of all the facts, weighing the probabilities, he may even accept evidence in spite of improbability from a conviction, after watching demeanour, that a particular witness has told the truth, and that a witness or witnesses to the contrary have not. In the latter case the burden of an appellant is heavy, but it is not insupportable. The appellate court has still to determine the issue between the parties and may feel constrained to hold that the judge's estimate of the witnesses is mistaken. It is, in my opinion, a mistake to suppose that the decision of this House in the *Hontestroom* [1927] AC 37, laid down as a proposition of law that an appellate tribunal must in all cases accept the findings of a trial judge where he purports to base these on his belief in the credibility of particular witnesses. No court can so restrict its statutory jurisdiction; and in these days, where civil cases involving important questions of credit and reputation and even of liberty are determined by a judge alone, it is of great importance that the full jurisdiction should be maintained.

Again, in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at p 430, Lord Pearce's dissenting speech contains the following valuable reminder: A

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. *It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions.* Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree. B C

We now turn to consider the second defect in the judgment of the trial court. The learned judge accepted the evidence of the first defendant upon a critical issue which was never put to the appellant during his cross-examination. D

The main thrust of the defendants' case was that the plaintiff had requested the first respondent's permission to climb the tree which the first respondent refused. The plaintiff's case, on the other hand, was that he had been instructed by the first defendant to make the climb. But nowhere in the defence was it alleged that there was such a request as alleged in the evidence. Further and more importantly, it was never put to the plaintiff under cross-examination that such a request had come from him. The trial judge ought to have taken this failure into account when he came to assess the evidence. But nowhere in his judgment is there any indication that he did so. In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 794, this court when applying the rule in *Browne v Dunn* (1893) 6 R 67 said: E F

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well. G

We are satisfied that if the learned judge adopted the correct approach to the evaluation of evidence, we have no doubt that he would have found for the plaintiff. H

Accordingly our judgment was that the plaintiff was entitled to recover. Quantum having been agreed, we made an order that the plaintiff do recover the sum of RM135,000 inclusive of interest and agreed costs of RM10,000. We also ordered the deposit to be refunded to the plaintiff. I

Appeal allowed.

Reported by Azra Azman